Supreme Court, U.S.
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No. 93-1513

In the Supreme Court of the United States

OCTOBER TERM, 1993

KURT HENRY VAN ENGEL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that the court of appeals erred in reversing the order of the district court dismissing 13 counts of the indictment in this case.

1. On January 3, 1991, petitioner was indicted by a grand jury sitting in the Eastern District of Wisconsin. The indictment charged petitioner with mail fraud, in violation of 18 U.S.C. 1341; obstruction of justice, in violation of 18 U.S.C. 1503; racketeering, in violation of the RICO statute, 18 U.S.C. 1962(c); tax fraud, in violation of 26 U.S.C. 7206(1) and (2); and conspiracy to defraud the United States, in violation of 18 U.S.C. 371.[1]

[1] Initially, the indictment charged petitioner with 89 counts, and the district court dismissed 56 of those counts, primarily on

On December 21, 1992, the district court dismissed the RICO count, 11 tax fraud counts, and the conspiracy count as a sanction for what the court regarded as the government's interference with petitioner's Sixth Amendment right to counsel in its criminal investigation of his attorney, Stephen Kravit. Pet. App. 14a-44a. The court found that the two-year investigation of Kravit, a former Assistant United States Attorney, far exceeded what was necessary, and caused prejudice to petitioner because the investigation interfered with the attorney-client relationship. The court specified the prejudice as the government's refusal to discuss a plea agreement with Kravit on behalf of petitioner during the attorney's investigation; making the attorney a potential defense witness at petitioner's trial; causing petitioner to hire a new lawyer; and delaying the proceedings. *Ibid.*

The district court concluded that, while dismissal of the indictment would be an excessive penalty, several counts of the indictment should be "pruned." Pet. App. 42a. The court picked the RICO count because it was the most costly and time-consuming to defend, and the tax counts because the government could recoup its tax losses in a civil proceeding. *Id.* at 6a.

The court of appeals reversed.[2] Pet. App. 1a-13a. The court ruled that petitioner's rights were not violated by the government's two-year investigation of both petitioner and his lawyer. The court found nothing indicating that the preindictment delay would impede peti-

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statute of limitations grounds. Pet. App. 41a. Those dismissals were not appealed, and the counts underlying them are no longer at issue.

[2] The court of appeals also dismissed, for want of jurisdiction, petitioner's cross-appeal requesting dismissal of the entire indictment. Pet. App. 6a. That cross-appeal is not at issue here.

tioner's defense, and pointed out that the right to counsel does not attach until adversary judicial proceedings have begun. *Id.* at 8a-11a.

The court noted that "[i]n no previous appellate case has an investigation of a defendant's lawyer that ended before the trial began been held to interfere with the client's Sixth Amendment rights, let alone an investigation that exonerated the lawyer." Pet. App. 10a. The court continued that "[e]ven if the criminal investigation of Kravit had invaded an interest that the Sixth Amendment protects, there would be a question whether a criminal investigation of a lawyer that is conducted in good faith can ever invade the Sixth Amendment rights of the lawyer's clients." *Id.* at 10a-11a.

Because petitioner's rights were not violated and his defense was not prejudiced, the court of appeals found no basis for imposing a sanction that was tantamount to an acquittal by arbitrarily striking counts of the indictment. In the court's view, the trial judge's ruling was also premature because the time to assess an illegal interference with the right to counsel is after trial. Pet. App. 11a-13a.

2. Petitioner contends (Pet. 11-22) that the prosecutor's preindictment criminal investigation of his attorney violated due process and his right to counsel under the Fifth and Sixth Amendments, and that the district court's dismissal of the 13 counts of the indictment was an appropriate sanction. The court of appeals' decision places petitioner in precisely the same position he would have occupied if the district court had denied his motion to dismiss. If petitioner is acquitted following a trial on the merits, his contentions will be moot. If, on the other hand, petitioner is convicted and his conviction is affirmed on appeal, he will then be able to present his contentions to this Court, together with any other claims he

may have, in a petition for a writ of certiorari seeking review of a final judgment against him. Accordingly, review by this Court of the court of appeals' decision would be premature at this time.[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

DREW S. DAYS, III
Solicitor General

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[3] Because this case is interlocutory, we are not responding on the merits to the question presented by the petition. We will file a response on the merits if the Court requests.